

1996

Linda Mezenen v. Kelly Mezenen : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 960652 OA

IN THE UTAH COURT OF APPEALS

LINDA MEZENEN,)	REPLY BRIEF OF
)	CROSS APPELLANT
Plaintiff/Appellee/)	
Cross Appellant,)	
)	
vs.)	
)	
KELLY MEZENEN,)	
)	Case No. 960652
Defendant/Appellant)	
Cross Appellee.)	Priority No. 15

CROSS APPEAL FROM THE DECREE OF DIVORCE ENTERED BY THE
THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY
STATE OF UTAH, JUDGE FRANK G. NOEL

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COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

LINDA MEZENEN,)	REPLY BRIEF OF
)	CROSS APPELLANT
Plaintiff/Appellee/)	
Cross Appellant,)	
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vs.)	
)	
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ARGUMENT

POINT

THE APPELLANT IS UNABLE TO PRESENT SUFFICIENT REASON AS TO WHY HE WAS AWARDED THE PRE DECREE PROFITS OF THE L.L.C.

Mr. Mezenen in his brief acknowledges that the amount paid to Mrs. Mezenen as temporary alimony was the only partial distribution of the profits for 1994 and 1995 and the only pre decree profits distributed to her at all. Mr. Mezenen's position on appeal supports the claim by Mrs. Mezenen was an undisputed 50% owner in the L.L.C. which she organized and managed during the marriage. As an owner she was entitled to one half of the commercial enterprises net profits accumulated prior to separation and earned between separation and trial. The patent inequity of the Court's ruling is demonstrated by the fact that the amount of temporary alimony to Mrs. Mezenen of \$1,200.00 per month was set in a Pretrial hearing by a Domestic Relations Commissioner at the beginning of the proceedings without any critical analysis of the business and without proof of actual profits.

Mrs. Mezenen submits that after a critical analysis at trial, the Court gave the undistributed profits to Mr. Mezenen by denying Mrs. Mezenen specific request for

profits. In the Reply Brief, the Respondent does not justify the unfair award. Judge Noel ruled that there was not sufficient cash in the business being operated for both parties by the Respondent to pay for the distribution of the established pre decree profits. The Court also erred in ruling that value of the experts included accrued profits when the value was based by both accountants on the income approach which was based upon future expected income and not the value of accrued profits, equipment or assets. (See testimony of Mr. Norman, Defendant's expert attached hereto as Exhibit #4 in Appendix.)

However, not including Mr. Mezenen's concealed assets and diverted income, the business had \$16,300.00 in the business checking account in cash at the time of trial. Further, Mr. Mezenen indicated that during the three-month break in the trial, the business was sufficiently profitable that he was able to purchase a transport in the sum of \$12,000.00 in cash. (R. 1081) The concern had \$90,771.00 in accounts receivable for a total of a minimum of

\$119,000.00 in liquid assets available for distribution at the time of trial.¹

The Expert Accountant from the Plaintiff testified that without deducting an imputed income and "salary" for the year of 1994, Mrs. Mezenen's net income as a 50% owner was **\$40,000.00**. (R. 628) He testified that without deducting the fictional "salary" for the year of 1995, Mrs. Mezenen's 50% interest was **\$67,000.00**. (R. 628) The total of \$107,000.00 of profits should have been distributed to Mrs. Mezenen. A review of the closing arguments will reflect that after establishing the profits at trial, Mrs. Mezenen requested a distribution of those profits and set forth a specific method to distribute her interest. (See also Exhibit #14 attached hereto) If the business had to be liquidated to pay Mrs. Mezenen the profits, then the Court should have ordered the assets sold to pay the 50 percent owner 50 percent of the profits. Fundamental fairness required equal distribution to owners, not deference to allow Mr. Mezenen the ability to operate the business in a comfortable fashion after a token payment to his wife.

¹ Mr. Mezenen should have been awarded the equipment unilaterally purchased for cash or the property should have been sold.

The trial Court treated Mrs. Mezenen not as a business partner and member of a limited liability Company but as a wife of the owner. *Utah Code Annotated* 48-2b-130 (1953) states that in Limited Liability Company's as to Profits that:

The profits and losses of a limited liability company shall be allocated among the members in the manner provided in the operating agreement. If the operating agreement does not otherwise provide, profits and losses shall be allocated on the basis of value of the contributions made by each member to the extent they have been received by the limited liability company and have not been returned. Value of the contributions made shall be determined as stated in the articles of organization or the records of the limited liability company as required by Section 48-2b-119 .

Utah Code Annotated 48-2b-132 (1953) provides for distribution of property consistent with Mrs. Mezenens requests by providing:

(1) A member shall receive no distribution of limited liability company property on account of any member's contribution to capital until:

(a) all liabilities of the limited liability company, except liabilities to members on account of their contributions to capital, have been paid or sufficient property of the company remains to pay them; and

(b) the consent of all members is obtained, unless the return of the contribution to capital may be rightfully demanded as provided in this chapter, the articles of organization, or the operating agreement.

(2) Subject to Subsection (1), a member may rightfully demand the return of the member's contribution:

(a) upon the dissolution of the limited liability company;

The manner and method of distribution by the Court of Mrs. Mezenen's interest was inequitable and cannot be supported by Mr. Mezenen. The award of the profitable business commercial enterprise cannot be supported by any logical or legal analysis. The disparity can only be the result of gender bias viewing Mrs. Mezenen as less than a fifty percent owner of the business whose status as a wife forfeited her interest in the business.

The Trial Court should be reversed and directed to equally divide the net profits of the business and fairly divide the assets.

POINT II

THE IMPUTED SALARY TO MR. MEZENEN IS A FICTION AND NOT BASED UPON FACT AND RESULTED IN AN UNFAIR DISTRIBUTION OF THE BUSINESS

In analyzing this issue, it should keep in mind that the word "imputed" salary means "fictional salary" created by the accountant hired by the Defendant to influence value. Imputing a fictional salary favor the party in temporary control of the business due to the separation did not in any

manner reflect the actual or historical business operation prior to separation and under the temporary order.

Concerning the actual operation during separation of the parties the evidence was undisputed that Mrs. Mezenen received a \$2,000.00 a month salary and Mr. Mezenen received no salary during separation. At the Pretrial proceeding, Mr. Mezenen wanted Mrs. Mezenen excluded from the business despite her request to continue her important management functions. Mr. Mezenen in his reply brief fails to mention that he voluntarily agreed to operate and continue the business and had a fiduciary duty to Mrs. Mezenen as an equal partner. However, his salary amounted to \$24,000.00 per year, until he unilaterally increased the salary just prior to the divorce trial. He continued to run and operate the business based upon that actual salary which he as a member of the L.L.C. agreed to accept.

The fiction of the imputed salary was based upon an outlandish amount of work hours not actually performed and an amount Mr. Mezenen never requested until trial. The expert made absolutely no analysis of actual business records, time cards or actual performance to arrive at that arbitrary salary. Marshaled below is a graphic

demonstration of the effect of the fictional salary on Mrs. Mezenen's interest which clearly discriminated against the appellant as an owner who was not awarded temporary use of the business during the pendency of the Divorce Decree:

	<u>Allocated 50/50²</u>	<u>Kelly</u>	<u>Linda</u>
1993 Income	\$55,081.00	\$27,541.00	\$27,541.00
1994 Income	\$80,010.00	\$40,005.00	\$40,005.00
1995 Income	\$134,851.00	\$67,426.00	\$67,426.00

	<u>Allocated with Imputed Salary to Kelly Mezenen</u>		
1993 Income	\$55,081.00	\$27,541.00	\$27,541.00
1994 Income	\$80,010.00	\$76,010.00	\$4,000.00
1995 Income	\$134,851.00	\$104,945.00	\$29,945.00

Value

1. Value using Merrill Norman's figures with "imputed" salary \$111,649.00
2. Value using Merrill Norman's figures with no "imputed" salary³ \$365,955.00

² See Exhibit 11c.

³ See Exhibit 28B. (Attached)
See Exhibit 18.

Mr. Mezenen's position on value and distribution of profits cannot be supported unless the Court treats the business as essentially a preference and privilege to the husband Mr. Mezenen. The Appellant cannot escape the fact that he received a business that would pay a \$75,000.00 salary, a business that net additional profits each year above the salary and, make use of several hundred thousand of equipment, by paying his partner only \$61,000.00 and shifting to the other member a tax liability for income taxes.

POINT III

THE COURT DISREGARDED THE FACTS CONCERNING THE PARTIES PREMARITAL RELATIONSHIP AND ERRONEOUSLY AWARDED MR. MEZENEN \$18,800.00

The Utah Supreme Court has clearly indicated that evidence concerning the premarital relationship is sufficient to bring this matter within the distribution as to the Court to both parties. The property was acquired during the time Mr. Mezenen and Linda Andrus, the future Mrs. Mezenen, was living together and jointly acquiring assets. As set forth in the opening brief, the parties went so far as making an offer as unmarried persons with the cash

which the Judge later determined in some manner was separate property and premarital of Mr. Mezenen.

POINT IV

THE UNFAIR DISTRIBUTION OF THE TAX CANNOT BE JUSTIFIED BY THE DEFENDANT

Mrs. Mezenen's argument concerning taxes is hopefully not an unintelligible argument as claimed by Mr. Mezenen. The basic premise is that the result of the Court's ruling as to the imputed salary was not in a balanced way applied to the payment of taxes for the same period of time. Mrs. Mezenen was subjected to tax liability on one half of the profits of the business for the years 1994 and 1995 which she was not awarded because the Court adopted the imputed Seventy Five-Thousand Dollar salary to Mr. Mezenen and found that he had managed the business to spend the cash. The income tax is due on reported profits, the same profits that Mrs. Mezenen was never distributed. The tax liability does not reflect the actual distribution of profits by the Decree of the Court. The same disparity set forth in Point II as to profits also applies as to taxes.

Fundamental fairness and logic dictate that if Mr. Mezenen receives his value of the business based upon the

imputed salary, it should also be arbitrarily imputed to him and he is required to pay the salary and pay the taxes on a salary to himself of Seventy Five-Thousand Dollars.

Otherwise, Mrs. Mezenen will end up paying taxes on profits shifted to Mr. Mezenen by acceptance of the imputed salary and lack of funds to pay or distribute the profits.

Profits allocated with Imputed Salary to Kelly Mezenen

		<u>Kelly</u>	<u>Linda</u>
1993 Income	\$55,081.00	\$27,541.00	\$27,541.00
1994 Income	\$80,010.00	\$76,010.00	\$4,000.00
1995 Income	\$134,851.00	\$104,945.00	\$29,945.00

Tax liability as 50 % L.L.C. member

		<u>Kelly</u>	<u>Linda</u>
1993 Income	\$55,081.00	\$27,541.00	\$27,541.00
1994 Income	\$80,010.00	\$40,005.00	\$40,005.00
1995 Income	\$134,851.00	\$67,426.00	\$67,426.00

POINT V

**THE COURT CORRECTLY AWARDED ATTORNEY'S FEES TO
MRS. MEZENEN**

Mrs. Mezenen did make a mid-trial amendment as significant in the awards of attorneys' fees. First of all,

it should be remembered that the trial started in January 1996 and was continued until May 1996. During that period of time, Mrs. Mezenen and her counsel discovered that Mr. Mezenen was hiding and concealing assets, not reporting checks as required by the Court Order and committing fraud in his defense of his claim against Mrs. Mezenen for an award of the business. A considerable portion of the trial was based upon the preservation of this evidence.

It is not controverted that Mr. Mezenen defended Mrs. Mezenen's attempt to obtain the business by concealing profits and that defense was clearly in bad faith and was more than sufficient reason to grant the attorney's fees.

The Court found he hid assets and willfully failed to account for income while he was operating the business for both partners on court order. *Utah Code Annotated*

48-1-17(1953) provides:

Partners shall render on demand true and full information of all things affecting the partnership to any partner, or the legal representatives of any deceased partner, or partner under legal disability.

Mr. Mezenen during the separation disregarded *Utah Code Annotated 48-1-18 (1953)* which provides:

Every partner must account to the partnership for any benefit, and hold as trustee for it any profits, derived by him without the consent of the other partners from any

transaction connected with the formation, conduct or liquidation of the partnership or from any use by him of its property.

The Court correctly awarded fees due as a result of the fraud and bad faith of Mr. Mezenen. He was under a duty to account under the temporary order which he violated in order to attempt to reduce the value and profits of the business at the impending trial.

POINT VI
DEFENDANT'S APPEAL ON THE ISSUE OF COHABITATION IS
INCONSISTENT WITH HIS SUPPORT OF THE DISTRIBUTION OF PROFITS

In the Reply Brief, Mr. Mezenen admits that the only distribution Mrs. Mezenen received was through the temporary alimony award. Mr. Mezenen does not deny the fact that he was paying the alimony amounts directly out of the company's check and until corrected by the accountants at trial, was deducting the alimony as a business expense. The cohabitation issue was fully presented to the Court and the Court never even found that the friend of Mrs. Mezenen was residing at the same residence at any time.

A reverse of temporary alimony award would effectively deny her the very limited amount she received on her fifty percent ownership interest in the net profits of the

CONCLUSION AND REQUEST FOR RELIEF

The ruling and total distribution should be reversed and the Court required to evenly divide and distribute business property based upon Mrs. Mezenen's interest as a 50% owner and equal member of the LLC. The Defendant should not have been awarded the business because he was concealing assets, hiding checks, and falsely reporting income.

The Defendant was temporarily awarded the right to continue business during the separation and he paid the "alimony" payments directly out of the business accounts. The evidence proved he even attempted to treat the alimony payments as a business expense until the Plaintiff's expert corrected this questionable business accounting.

The judgement should be reversed as to profits and value and a new trial awarded with specific directions to divide the L.L.C. one-half to each party without an award of a salary to the Defendant and a 50/50 split of profits, equipment land, cash accounts receivable and future value of the business. Plaintiff should be awarded attorney fees based upon the Defendant's fraud and bad faith attempt to present a defense and to undermine value of the business. Finally, the Court must fairly apportion taxes if Mrs. Mezenen is denied profits and a fair distribution of assets.

business. Then she would be required to pay income taxes for 1995 for income awarded to her husband without any distribution of profits from the L.L.C.

DATED this _____ day of October, 1997.

RANDALL GAITHER
Attorney for Respondent/
Cross Appellant

MAILING CERTIFICATE

I hereby certify that on the _____ day of October, 1997, a two true and correct copy of the foregoing Reply Brief was mailed First Class Mail, postage prepaid to:

CLARK W. SESSIONS
CAMPBELL MAACK & SESSIONS
ONE UTAH CENTER, 13TH FLOOR
201 SOUTH MAIN STREET
SALT LAKE CITY, UTAH 84111-2215

DATED this _____ day of October, 1997.

IN THE UTAH COURT OF APPEALS

LINDA MEZENEN,)	ADDENDUM
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Plaintiff/Appellee/)	
Cross Appellant,)	
)	
vs.)	
)	
KELLY MEZENEN,)	
)	Case No. 960652
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Telephone: (801) 537-5555
Attorneys for Appellant/Cross Appellee

SET FORTH IN THIS ADDENDUM ARE DOCUMENTS NOT SET
FORTH IN THE APPELLANT'S ADDENDUM AS FOLLOWS:

<u>EXHIBITS</u>	<u>PAGE NO.</u>
1. Trial Exhibit #14 (Plaintiff's Exhibit)	1
2. Trial Exhibit #28B (Plaintiff's Exhibit)	3
3. Trial Exhibit #18 (Defendant's Exhibit)	4
4. Cross Examination of Merrill Norman, expert for Defendant	9

DESCRIPTION	VALUE	MRS. MEZENEN	MR. MEZENEN
Real property			
1 Mount Haven Cabin Lot	\$20,000	\$20,000	
Debt to Def Parents (app)	(\$ 7,000)		(\$ 7,000)
2 Bagley Park Lot	\$20,000	\$20,000	
Mortgage U C C U ¹	(\$10,000)		(\$10,000)
Kelly's Excavating, LLC			
Value of ongoing business ²	\$448,563		\$448,563
New Equipment (1996) ³	\$14,245		\$14,245
less Equipment to Plaintiff			
1971 Kenworth	\$10,500	\$10,500	(\$10,500)
1994 Case loader	\$16,600	\$16,600	(\$16,600)
1974 950 loader	\$18,500	\$18,500	(\$18,500)
		2,500	-(2,500)
Advance payment of member's Taxes:			
Tax Prepayments 1994 ⁴	\$ 10,044	\$ 10,044	
Tax Prepayments 1995 ⁵	\$ 9,000	\$ 9,000	
Tax Prepayments 1996 ⁶	\$ 2,000	\$ 2,000	
Personal loans recievable as of date of seperation:			

¹ 9285 South Howley Park Road, Riverton, Utah. Titled Linda Mezenen and Mortgage in the name of Linda Mezenen owed to Utah Central Credit Union of app \$10,000 00(Plaintiff requests that Defendant refinance)

² Based upon Plaintiff's Exhibit 28a (Defendants experts value calculations adjusted for unpaid salary and no key man discount), includes Balance of equipment of \$180,675 00 as appraised (Plaintiff's Exhibit 15) less equipment to Plaintiff of \$45,600 00 and accounts receivable of \$81,545 00 (Plaintiff's Exhibit 33)

³ 1975 Peterbuilt Transport purchased for cash by check number 2165 on May 7, 1996 for \$12,000 and tool boxes purchased January 15, 1996 from Mary Willaims check no 1965 for \$1,245 00, and \$1,000 00 to Gary Feilding for 1974 Chevrolet one ton truck (Aquired since appraisal)

⁴ Paid by Kelly's Excavating LLC to IRS for benefit of both 50% members (Plaintiff's Exhibit 11)

⁵ Paid by Kelly's Excavating LLC to IRS for benefit of both 50% members (Plaintiff's Exhibit 11)

⁶ Paid by Kelly's Excavating LLC to IRS for benefit of both 50% members (Plaintiff's Exhibit 11)

Jesse Steel	\$2,600	\$2,600	
Gary Fielding	\$1,296		\$1,296
urniture and furnishings:			
Property at Plaintiff's residence ⁷	\$5,597	\$5,597	
Property at Defendant's residence ⁸	\$17,737		\$17,737
Cash owned at seperation			
Cash in safe	\$19,800		\$19,800
First Security Bank CD ⁹	<u>\$13,552</u>	<u>\$13,552</u>	<u> </u>
SUBTOTAL		(\$128,393	(\$449,041
TO BALANCE		130,893	446,541
		(\$160,724	
ADJUSTMENTS TO AMOUNT TO BALANCE		157,824	
Attorney fees and costs (estimated)		\$ 15,000	
Accounting fees		\$ 2,077	
Distribution to Plaintiff of ¹ / ₂ unpaid profits ¹⁰		\$106,724	
Distribution to Plaintiff of tax prepayments ¹¹			
PROPOSED TOTAL JUDGEMENT AMOUNT		\$284,525	

⁷ Property jointly acquired and taken by Plaintiff and removed to 9967 South 400 West, West Jordan, Utah

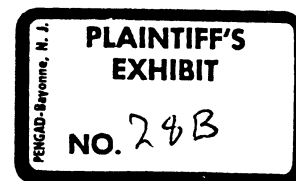
⁸ Property acquired and left in Defendant's possession at 10085 South Bagpiper Circle, South Jordan, Utah

⁹ To be awarded by judgment to Plaintiff plus accrued interest (secured by Kenworth to be awarded to Plaintiff)

¹⁰ Plaintiff's Exhibit 11	Total	Plaintiff	Defendant
1994 net income before taxes:	\$80,010	\$40,005	\$40,005
less: alimony or draw		(\$2,400)	(\$8,600)
less: salary ¹ / ₂ to each		(\$6,000)	(\$6,000)
1995 net income before taxes:	\$134,851	\$67,426	\$67,426
less: alimony or draw		(\$15,600)	(\$33,500)
1996 net income before taxes:	\$56,187	\$28,093	\$28,093
less: alimony or draw		(\$4,800)	(\$19,000)
Total.....		\$106,724	

(Note: 1996 Income based upon 5/12ths 1995 Income, even though gross receivable increased by 28.3%, see Exhibit 34)
Defendant requests an award of lien or assignment on accounts receivable until this amount paid (balance \$81,545)

¹¹ Subject to order allowing each party to claim one half of repaid amounts on individual partnership returns. Defendant should be ordered to pay all penalties and interest due to late filing.



MEZENEN V MEZENEN

Run Date 31-Jan-96

Calculation of Value based on Merrill Norman's
Formula with adjustments to Net Income

=====

Adjusted Net Income - December 31, 1995
based on Merrill Norman's calculation \$63,043

Salary (Guaranteed
Payment) to Kelly per Merrill Norman 75,000

Salary (Guaranteed
Payment) to Kelly per Company Records 29,000

Add back Excess to Income 46,000 46,000

December 31, 1995 net income adjusted for
excess "salary" to Kelly \$109,043

=====

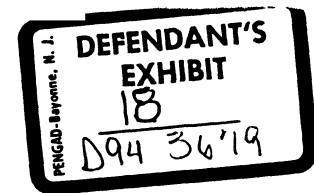
Application of Premium & Discount
factors/Merrill Norman

Divide by Cap Rate	26.40%	\$413,042
Control/Mrktbl Value	42.60%	175,956
Control/Nonmrktble	-34.00%	(140,434)
Key Man Disc	-20.00%	(82,608)

Value based on Merrill Norman's analysis, adjusted for salary \$365,955

=====

Kelly's Excavating LLC
Adjusted Balance Sheet
For the Year Ending December 31, 1995



	1995	Adjustments	Adjusted 1995
Current Assets			
Cash	\$ 14,253	\$ 12,000	\$ 26,253
Accounts Receivable	90,772	(14,978)	75,794
Other	(1,695)	1,695	-
Total Current Assets	103,330	(1,283)	102,047
Fixed Assets			
1974 Chev One Ton	1,000	(1,000)	-
1988 Ford One Ton	4,942	(4,942)	0
Bagley Park Lot	19,010	4,990	24,000
Uniloader	13,343	(13,343)	-
Value of Equipment per Appraisal	-	168,125	168,125
Total	38,295	153,830	192,125
Less Accumulated Depreciation	-	-	-
Total Fixed Assets	38,295	153,830	192,125
Total Assets	<u>\$ 141,625</u>	<u>\$ 152,547</u>	<u>\$ 294,172</u>
Current Liabilities			
Accounts Payable	\$ -	\$ 17,354	\$ 17,354
1994 Income Tax Liability		10,400	10,400
1995 Estimated Income Tax Liability		20,000	20,000
Payroll Taxes	(4,164)	4,164	-
Credit Card	(252)	252	-
Other Current Liabilities	(12,276)	12,276	-
Total Current Liabilities	(16,692)	64,446	47,754
Long-term Debt			
Long-term Debt	(8,854)	8,854	0
Home Equity Loan for Equipment	-	1,300	1,300
Long-term Debt per Payoffs	-	148,553	148,553
Total Long-term Debt	(8,854)	158,708	149,854
Total Liabilities	(25,546)	223,154	197,607
Equity			
Opening Balance	(33,897)		(33,897)
Retained Earnings	99,798	(70,607)	29,192
Net Income	101,270		101,270
Total Equity	167,171	(70,607)	96,565
Total Liabilities and Stockholder's Equity	<u>\$ 141,625</u>	<u>\$ 152,547</u>	<u>\$ 294,172</u>

Kelly's Excavating LLC
Adjusted Income Statement
For the Year Ending December 31, 1994

	1994	Adjustments	Adjusted 1994
Income			
Construction	\$ 290,930		\$ 290,930
Kelly Mez Draw	(8,600)	8,600	-
Total Income	282,330	8,600	290,930
Cost of Goods Sold	50,818		50,818
Gross Profit	231,512	8,600	240,112
Expenses			
Advertising	3,271		3,271
Alimony	2,400	(2,400)	-
Automobile Expense	11,005	(3,000)	8,005
Concrete and Dirt	4,228		4,228
Brick Work	926		926
Contributions	278		278
Cleaning	195		195
Leasing Equipment	11,510	(11,510)	-
Equipment Rental - Other	5,374		5,374
Freight & Delivery	116		116
Fuel	8,909		8,909
Insurance	6,088		6,088
Rent	5,510	(5,010)	500
Landscaping	3,999		3,999
Licenses and Permits	4,833		4,833
Miscellaneous	6,529		6,529
New & Used Equipment	7,248	(7,248)	-
Office Supplies	143		143
Insurance payroll	1,735		1,735
Payroll Expenses - Other	29,482	(7,443)	22,039
Accounting	245		245
Equipment Repairs	20,467	(8,711)	11,756
Payroll Taxes - Other	4,190	(1,042)	3,148
Repairs - Other	1,097		1,097
Property	238		238
State	3,080		3,080
Taxes - Other	15,948	(10,044)	5,904
Telephone and Pager	5,123		5,123
Tools and Machinery	2,884		2,884
Transporting equipment	(50)		(50)
Travel & Ent - Other	1,079		1,079
Visa Payment	828		828
Work Clothes	332		332
Rent and Utilities	-	5,451	5,451
Interest Expense on Kenworth	-	350	350
Interest Expense on Bagley Lot	-	507	507
Interest Expense on Uniloaders	-	1,307	1,307
Interest Expense on 590 Backhoe	-	3,838	3,838
Fair Salary for Kelly	-	72,000	72,000
Capital Expenses	-	28,966	28,966
Total Expense	169,239	56,011	225,251
Net Income	\$ 62,273	\$ (47,411)	\$ 14,861

Kelly's Excavating LLC
Adjusted Income Statement
For the Year Ending December 31, 1995

	1995	Adjustments	Adjusted 1995
Income			
Construction	\$ 339,419		\$ 339,419
Kelly Mez Draw	(33,500)	33,500	-
Total Income	<u>305,919</u>	<u>33,500</u>	<u>339,419</u>
Cost of Goods Sold	<u>42,533</u>		<u>42,533</u>
Gross Profit	263,386	33,500	296,886
Expenses			
Advertising	923		923
Alimony	15,600	(15,600)	-
Bank Service Charges	140		140
Bond Expense	850		850
Total Conc/Dirt	652		652
Contributions	555		555
Dump Fee	220		220
Leasing Equipment	22,503	(19,791)	2,712
Equipment Rental - Other	5,455		5,455
Freight & Delivery	160		160
Fuel	11,059		11,059
Insurance	9,481		9,481
KENWORTH & 1988 FORD	472		472
Landscaping	140		140
Licenses and Permits	458		458
Medical Expense	35		35
New & Used Equipment	8,057	(8,057)	0
Office Supplies	192		192
Insurance payroll	3,808		3,808
Payroll Expenses - Other	38,287		38,287
Accounting	1,389		1,389
Equipment Repairs	8,989		8,989
Repairs - Auto	2,683		2,683
Repairs - Other	1,230		1,230
Property	637		637
State	1,801	(405)	1,396
Taxes - Other	9,939	(9,000)	939
Telephone and Pager	7,699		7,699
Tools and Machinery	2,881	(2,000)	881
Transporting equipment	(200)		(200)
Travel & Ent - Other	4,894		4,894
Visa Payment	734		734
Work Clothes	397		397
Rent and Utilities	-	5,451	5,451
Interest Expense on Samsung	-	2,034	2,034
Interest Expense on Kenworth	-	350	350
Interest Expense on Bagley Lot	-	884	884
Interest Expense on Uniloaders	-	1,099	1,099
Interest Expense on 590 Backhoe	-	7,968	7,968
Fair Salary for Kelly	-	75,000	75,000
Capital Expenses	-	33,793	33,793
Total Expense	<u>162,117</u>	<u>71,726</u>	<u>233,843</u>
Net Income	<u>\$ 101,269</u>	<u>\$ (38,226)</u>	<u>\$ 63,043</u>

Kelly's Excavating LLC Capitalization of Earnings

Year	Adjusted Earnings	Constant Dollar Index	Constant Dollar Earnings	Weight Factor	Weighted Earnings
1994	\$ 14,861	102.7	\$ 15,257	1	\$ 15,257
1995	63,043	100.0	63,043	1	63,043
Total				2	\$ 78,300

Weighted Average Operating Income	\$ 39,150
Divide by: Capitalization Rate	26.40%
Minority/ Marketable Value	148,296
Control/ Marketable Value (42.6% Premium)	211,496
Control/ Nonmarketable Value (34% Discount)	\$ 139,561
Value With Key Man Discount (20% Discount)	\$ 111,649

Kelly's Excavating LLC
Calculation of Appropriate Marketability Discount
and Control Premium

Marketability Discount

<u>Study</u>	<u>Average Discount</u>
SEC, Overall Average	25.8%
SEC, Nonreporting OTC Companies	32.6%
Milton Gelman	33.0%
Robert Trout	33.5%
Robert Moroney	35.6%
Michael Maher	35.4%
Standard Research Consultants	45.0%
Willamette Management Associates, Inc.	<u>31.2%</u>
 Average Marketability Discount	 <u><u>34.0%</u></u>

Control Premium

<u>Study</u>	<u>Average Premium</u>
W.T. Grimm Control Premiums 1980	49.9%
W.T. Grimm Control Premiums 1981	47.9%
W.T. Grimm Control Premiums 1982	47.5%
W.T. Grimm Control Premiums 1983	37.7%
W.T. Grimm Control Premiums 1984	37.9%
W.T. Grimm Control Premiums 1985	37.2%
W.T. Grimm Control Premiums 1986	38.1%
W.T. Grimm Control Premiums 1987	38.3%
Houlihan, Lokey, Howard & Zukin 1986 Study	40.8%
Houlihan, Lokey, Howard & Zukin 1987 Study	48.4%
KPMG Peat Marwick 1982-1984 Study	<u>45.1%</u>
 Average Control Premium	 <u><u>42.6%</u></u>

1 And if you find bills that are paid, you go back
2 and look at them and see if you can find some evidence that
3 the obligation truly pre-dated the end of the accounting
4 period; and if it does, you make adjustments for it. That's
5 what was done with the typed items.

6 The remaining items are additional invoices that
7 were brought to us as evidence of obligations, although yet
8 unpaid, still pre-date the end of the financial accounting
9 period.

10 Q Thank you.

11 MR. GAITHER: I'm going to need to look at those,
12 maybe I could do that at a break and make appropriate
13 copies.

14 THE COURT: Very well.

15 Q (By Mr. Gaither) Concerning the income tax
16 liability. You booked that 1994 income tax liability. As I
17 understand, your basic theory here is that in 1994, you want
18 to go back and give Mr. Mezenen a salary of how much?

19 A Of about \$72,000.

20 Q Okay.

21 A I wouldn't call it his salary. I would say that
22 is the fair market value of the hours that he says he
23 worked, basically the hours multiplied by the dollars per
24 hour, and a very small amount added for benefits, like \$500
25 a month in benefits, when in fact, the Union contracts and

1 the real world jobs have five to \$7 per hour benefit loads.

2 Q Well, when you are considering the books and
3 records, you treated that amount as an expense, didn't you?

4 A I did. I just took exception with the word
5 "salary", which conjures up ideas of a pre-set amount that
6 he doesn't receive at one time.

7 Q It's an expense, and that amount would be deducted
8 and the LLC would not take, based upon the expense, would
9 they?

10 A That's right.

11 Q Mr. Mezenen would pay personal tax on that,
12 wouldn't he?

13 A Yes.

14 Q Personal income tax and the 1994 estimate for
15 income tax liabilities is essentially his personal income
16 tax. And under your theory, he should be paid an income as
17 an employee for 1994.

18 A Well, it's going to be really a personal tax
19 anyway. We look at it with this LLC. I think there are two
20 ways that this should be handled--

21 Q You've answered my question. And it would be that
22 the \$10,400 would essentially be and what you're saying is,
23 it's appropriate he should be paid the money as an income,
24 and then the LLC should, on top of that, pay him an
25 additional \$10,400--

1 A No.

2 Q --to represent his income taxes?

3 A No. I'm saying that--and certainly the Court

4 could correct me if I am wrong here. I have worked on

5 dozens and dozens of these divorce cases. It's my

6 understanding that until a couple is divorced, even though

7 they may live apart, that the marital estate remains intact.

8 And I'm saying, this is a tax liability that comes out of

9 the marital estate, and doesn't particularly matter to me,

10 nor should it, I believe, to the Court, whether or not it's

11 shown as a business obligation or as a personal obligation

12 for those folks jointly. But the--the distinction, and I'll

13 go through it--

14 Q I would like you to answer my question.

15 A Okay.

16 Q If you follow your theory--

17 A Yes.

18 Q --and if Mr. Mezenen takes an expense to pay for

19 his services, of \$75,000--

20 A Seventy-two.

21 Q --the \$10,400 would be his taxes on that \$72,000?

22 A No. The \$10,400 has nothing to do with my

23 calculation of income. It is the amount that is now owed to

24 the Internal Revenue Service under the accounting tax

25 records that have already taken place. So, it's an

1 obligation, even if you want to put it in a bowl and stir it
2 around, but unless we have amended the tax return, that
3 still will be the obligation.

4 Q Well, isn't this inconsistent with the deducting
5 of this amount down below as an adjustment? You've adjusted
6 the amount of earnings by taking this salary out, haven't
7 you?

8 THE COURT: You're on the income statement now?

9 MR. GAITHER: No. I'm not. I'll get back to
10 that.

11 MR. SESSIONS: Would you ask Mr. Gaither if he
12 could move over so I can see the witness?

13 THE COURT: Now, you've followed the estimated
14 income tax liability for 1995, under your theory of this
15 matter is that amount that you receive from the income tax
16 returns that have been prepared?

17 THE WITNESS: No. They have not been prepared.

18 THE COURT: Okay. Let's see now, 1995?

19 THE WITNESS: On the balance sheet, your Honor.
20 Just below about the mid-point on the schedule.

21 THE COURT: Okay.

22 Q (By Mr. Gaither) Let's go back to the 1994 that
23 I'm going to show you--

24 THE COURT: Let me ask you, how did you come up
25 with \$20,000 for that tax liability?

1 THE WITNESS: Your Honor, we estimated that it
2 would ~~be~~ least be in that range and we came (indicating),
3 which is taxes at, you know, roughly a third of the income.
4 But all of our calculations are done on pre-tax earnings
5 anyway, doesn't go into the evaluation analysis. The only
6 place it has any bearing is in the adjusted net worth
7 balance sheet approach. That's what I was trying to say a
8 moment ago.

9 And there's two ways this can be handled. One is
10 to put some estimates in here for the liability that is
11 owed, either by the corporation or individually, doesn't
12 particularly matter, in the marital estate for both years;
13 or in the alternative, take both of those numbers out of my
14 balance sheet for 1995 and say that it is a reasonable
15 estimate of some taxes that will have to be paid, in which
16 case, my net worth method is now shown at \$96,565 of the
17 total equity on the balance sheet.

18 If you remove that \$30,400 in tax liability, then
19 you have a figure that is going to be roughly \$126,000,
20 okay? I have no problem with that. And let the value on
21 that method be \$126,000.

22 THE COURT: Doesn't change your opinion on the
23 value of the company?

24 THE WITNESS: It doesn't change my opinion on the
25 value of the income approach, lll. In fact, I think the two

1 come into sync, because of this factor. As I said over and
2 over again, I think there would be a cost to liquidate and
3 obligations to be paid on the equipment and so forth on
4 those costs that pertain to the equipment, say 10,000 or ten
5 percent of the \$168,000 of equipment; ten percent being a
6 very low commission for selling equipment.

7 And you take the \$16,000 away and then you get
8 down to 110 on the adjusted balance sheet method, and then
9 111 on the income method, and you still owe some amount of
10 tax in marital estate in total. And if I am wrong and it
11 doesn't add up to \$30,000, then the Court can simply have
12 the parties share equally in the tax liability when their
13 accountant is doing the tax return and it's solved.

14 Then we have two methods \$1,000 apart and we have
15 an undetermined tax liability that can be checked out with
16 actual numbers. And it seemed to take some of the concern
17 away from the measurement.

18 THE COURT: Go ahead, Counsel.

19 Q (By Mr. Gaither) I'll show you what has been
20 marked as Exhibits 27 and 27A and ask if you've seen those
21 partnership returns of income for the year 1994 for the
22 Kelly's LLC? Have you seen those?

23 A Yes.

24 Q And do you know who they were prepared by?

25 A They show as the preparer, Johnson Tax Service.

1 proof of what the income of the company really was, I think
2 that's a different issue. See what I mean?

3 MR. GAITHER: Yes. On that issue, I think the
4 Court can receive them.

5 THE COURT: On that issue?

6 MR. GAITHER: I'll reserve it until Mr. Mezenen
7 takes the stand, but he's going to have to call this witness
8 back, that Mr. Mezenen hired as an accountant. And he had
9 these tax documents prepared and he's an agent.

10 THE COURT: I see your point, but there is a
11 foundation problem if you are presenting them--

12 MR. GAITHER: I'll reserve them.

13 THE COURT: --for the purpose of the truth of the
14 figures for purposes of this examination of this witness,
15 it'll be subject to a motion to strike them if there's not a
16 foundation laid.

17 MR. GAITHER: I'll introduce them later then, your
18 Honor, and go on to the next topic.

19 Q (By Mr. Gaither) Concerning--going back to the
20 \$20,000 estimate of the income tax liability, what you're
21 saying is roughly one-third of the taxes of Kelly Mezenen if
22 he was to receive your proposed \$72,000 salary; is that
23 correct?

24 A That's correct. But he didn't receive it, so
25 there should have been more taxes paid because he hadn't

1 received it, there's still more reportable earnings by the
2 company.

3 Q And do you feel it's consistent with the standard
4 established by the American Institute of Certified Public
5 Accountants to account on a balance sheet for the company,
6 for the LLC, the individual tax liability of Kelly Mezenen?

7 A I don't think it matters either way, because it's
8 one asset in the marital estate and always goes into the
9 same thing that we're accounting for. I had hesitancy in
10 putting it in there, but was not asked to do the listing of
11 our marital assets.

12 Like I said a few moments ago, it doesn't matter
13 if you--

14 Q Was your hesitancy based upon the fact that it's
15 not a normal accounting procedure?

16 A No. No. These items account for personal income
17 tax liability in a business. And what we're doing here and
18 what you're referring to by standard, what you're trying to
19 do is account for assets, liabilities and net worth in an
20 economic sense, and not what may have been filed in a tax
21 return. You're not trying to hide anything, but the
22 relevant thing is economic value.

23 Q When you were first on the stand, you said that
24 you needed to look at the entire picture of the business
25 entity as a whole; is that right?

1 A Yes. You do.

2 Q And personal income taxes on a limited liability

3 corporation are outside that entity, aren't they, sir?

4 A Vary. There, you fall back into the marital

5 estate, so--

6 Q Thank you. You've answered my question.

7 Now, the other thing that you've done is, you've

8 made an adjustment of \$70,000 on the retained earnings at

9 the bottom here, from the books and records of the LLC; is

10 that right?

11 A That's right.

12 Q Now, if I understand the Quik N program, if you

13 ran a balance sheet and you did that, it would come up with

14 a total equity of \$167,000. And if we bring that computer

15 disk in and we run it, that is what would come out of the

16 computer?

17 A That's right. Before any adjustments.

18 Q Now, you made a major adjustment on these retained

19 earnings by essentially the major factor here, and I'm just

20 trying to get to this real quick. The major factor here is

21 that in the year 1994, you indicated that Mr. Mezenen should

22 have a fair salary of \$72,000 and in 1995, he should have a

23 fair salary of 75,000.

24 Now, that's the major factor there, isn't that

25 right?